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Communities of Arizona and Michael A. Parham

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

Supreme Court No. R-16-0040

PETITION TO AMEND THE
RULES OF PROCEDURE FOR
EVICITION ACTIONS

ADDITIONAL COMMENTS ON
RULE REVISIONS PROPOSED IN
ACAJ REPLY

These commenting parties object to the revised forms filed as a part of the Reply of the ACAJ on this proposed rule change. The objections are specifically set forth below.

**ACAJ FAILED TO COMPLY WITH "TRANSPARENCY" REQUIREMENTS
IN REVISING THE PROPOSED FORMS**

Supreme Court Administrative Order 2014-84 created the ACAJ. The Order provides in part:

3. Meetings. Commission meetings shall be scheduled at the discretion of the Chair. Pursuant to ACJA § 1-202, all meetings shall comply with the public meeting policy of the Arizona Judicial Branch.

ACJA § 1-202 provides in pertinent part as follows:

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A. Policy. To promote openness in government by assuring that the public has an opportunity to attend the meetings of all public councils of the supreme court and the Administrative Office of the Courts (AOC) while providing flexibility to close meetings when necessary

...

C. Procedures.

1. Meeting Notice.

a. Posting. Public council staff shall post meeting notices in the state courts building in a public area and on the Arizona Supreme Court internet site maintained by the Administrative Office of the Courts at least 48 hours prior to a meeting.

...

4. Public Access to Meetings. The public shall be permitted to attend meetings and listen to deliberations of public councils except as provided in subsection 5 below. The chair may permit public comment, other than during the call to the public, as appropriate. Public council staff shall schedule meetings in locations reasonably accessible to the public, including persons with disabilities, in rooms large enough to accommodate anticipated public attendance.

Undersigned counsel has been monitoring the ACAJ website at least three times a week since the September 23, 2016 deadline for public comment on this proposal. No notice of any meeting between September 23 and November 4, 2016 was posted until November 4, 2016. On that date a Meeting Agenda was posted on the ACAJ website announcing the agenda for its previously scheduled November 9,

1 2016 meeting.

2 Also posted that date was a Meeting Packet containing a Formal Action or
3 Request form that included the following statement: “the presenters will update the
4 commission on the pending rule petition R-16-0040 regarding mandatory eviction
5 forms, the comments received and reply to submit. The deadline for comments was
6 November 4, 2016.”
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9 Actually September 23 was the deadline for comments and November 4 was
10 the deadline for the ACAJ Reply. But the November 9 Meeting Agenda made it clear
11 that a Reply would not be published until after the proposed Reply had been approved
12 at the ACAJ meeting. Obviously that would be some time after November 9.
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14 The Formal Action or Request form also recommended adoption of a motion
15 “to support the filing of the proposed commission’s reply, as presented”. The
16 proposed Reply was not included in the packet effectively denying the public a
17 meaningful opportunity to review changes in the forms recommended for adoption as
18 mandatory notice and pleading forms in advance of the meeting.
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21 The original proposal and all comments posted on it were included in the
22 meeting packet. Only the proposed Reply was omitted.
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24 As will be seen below this is effectively a brand new rule change proposal by
25 the ACAJ since the forms have been materially changed from the original
26 submission. The revised forms were rewritten with no input from the public or any of
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1 the parties posting comments on the original petition. The absence of public input or
2 a publicly announced meeting will not under ACJA § 1-202 (E) (2), render a rule
3 fatally defective. But in a matter directly affecting an industry as large as the rental
4 housing industry in this state it certainly does not inspire confidence in the public that
5 the Court's administrative offices are acting transparently as Supreme Court
6 Administrative Order 2014-84 requires.

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9 **THE ACAJ REPLY IS NOT REALLY A REPLY BUT IS A NEW PROPOSED**
10 **RULE CHANGE THAT DOES NOT COMPLY WITH RULE 28**

11 The Reply includes revisions to the forms originally submitted with the initial
12 proposed rule change. The forms now being championed by the ACAJ are effectively
13 new forms. Yet this is not being treated as a new rule change proposal and if the
14 ACAJ is successful, these new versions of the forms will make it through the process
15 without any opportunity for public comment.

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18 Supreme Court Rule 28 does not contain a definition of what a Reply is or
19 address limits on the scope of such a Reply. However it is generally understood that a
20 Reply is limited in scope to addressing the points made in a Response to a Motion.
21 For example, Arizona Rules of Civil Appellate Procedure, Rule 13 limits Reply Briefs
22 in civil appeals as follows:

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25 **(c) Reply Brief.** If the appellant files a reply brief, it must be strictly
26 confined to rebuttal of points made in the appellee's answering brief.

27 The Reply filed in this matter clearly exceeds the scope of the comments on the
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1 original proposal since those comments were limited to the forms it contained. What
2 this Reply does is to substitute revised forms in the hopes no further comments will be
3 permitted under the procedure it has elected to follow.
4

5 The reality is that this Reply is really a new proposal and should be treated as
6 such under Supreme Court Rule 28.
7

8 **SUPREME COURT PROPOSED RULE CHAANGE NO. R-16-0040 SHOULD**
9 **BE WITHDRAWN OR DENIED AND IF THE ACAJ WISHES, A NEW**
10 **PROPOSED RULE CHANGE CAN BE SUBMITTED COVERING THE NEW**
11 **FORMS UNDER SUPREME COURT RULE 28**

12 The reality is that the Reply is a new proposal. It should be subject to the
13 procedural requirements of Supreme Court Rule 28 just like any other proposed rule
14 change. It should be filed with a new Docket Number by January 20, 2017 with public
15 comments due by May 20.
16

17 **SPECIFIC COMMENTS ON REVISED RULE AND FORMS**

18 The following are but a few comments on the revised Rule and some of the
19 revised forms, submitted more for the purpose of demonstrating that this is a new
20 proposal rather than as an all inclusive listing or critique of them.
21

22 Rule 5 (a)
23

24 The following new language has been added: "...and, shall be used in justice of
25 the peace courts and may be used in superior court."
26

27 Rule 20 (a)
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1 The following language has been deleted: "...upon a showing of good cause
2 and...." Interestingly the Reply at page 3, lines 16-20 refer to that language as still
3 being there in arguing that the mandatory use requirement for the form is not really
4 mandatory.
5

6 Rule 20 (b)
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8 The names of forms 4 through 8 have been changed.

9 Summons
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11 Section 4 has been rewritten to change the advice given tenants on when
12 counterclaims can be filed. However the information is still incomplete and
13 misleading since a counterclaim is allowed only in eviction cases for nonpayment of
14 rent, a limitation that does not appear in the rewritten section.
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16 Complaint
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18 The second section on page 2 has been changed from "Other" to "Other
19 allegations of non-compliance on which eviction action is based", and the language
20 that follows the new title has also been added. This language indicates that only
21 violations resulting in written non-compliance notices count when determining if there
22 is cause to evict for repeated non-compliance. But ARS §33-1368 (A) does not say
23 that. Only the first instance needs to result in a non-compliance notice that will
24 presumably have been cured. Subsequent individual violations do not need to be
25 documented with non-compliance notices.
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1 Section 6 adds a new category of monetary relief: "Other fees, charges or
2 damages (as authorized by law)." But it also retains the last category that has been
3 revised by adding the word "allegations" and now reads: "Other allegations of
4 damages (as authorized by law)." Nothing tells us how these sections differ and what
5 sorts of damages are envisioned for each. *Pro per* landlords are going to have a hard
6 time figuring that out.
7

8 Judgment

10 The penultimate Order section adds the language "(dwelling unit or premises)."

11 The last Order section adds the following new category of damages to be
12 awarded to a plaintiff: "Other fees, charges or damages" while retaining separately the
13 categories "Damages" and "Other ____." We are not informed how these apparently
14 overlapping categories differ.
15

16 It is noteworthy that the language concerning stipulations mandated by the
17 RPEA has not been added to the Judgment form.
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19 5 Day Notice to Pay Rent

20 This has a new title.
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22 The following new sentence has been added to the shaded box: "After an
23 eviction action is filed, and in order to reinstate the lease, you may be required to pay
24 damages, attorney fees, and court costs." This is misleading at the least since many
25 tenants do not have a lease but are under month-to-month renewals of expired rental
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1 agreements.

2 5 Day Notice to Comply (Fix or Correct Problem)

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4 This too has a new title.

5 The following new sentence has been added to the shaded box: "After an
6 eviction action is filed, and in order to reinstate the lease, you may be required to pay
7 damages, attorney fees, and court costs." This is misleading for the reasons given
8 above.
9

10 Immediate Notice to Move

11
12 The following new sentence has been added to the shaded box: "After an
13 eviction action is filed, and in order to reinstate the lease, you may be required to pay
14 damages, attorney fees, and court costs." This is legally wrong. There is no right to
15 cure or reinstate a tenancy when an immediate and irreparable breach has taken place
16 under ARS §33-1368 (A). This is revealed in the first paragraph of the form that says:
17 "The violation(s) cannot be fixed."
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20 10 Day Notice to Comply (Fix or Correct Problem)

21 This also has a new title.

22
23 The following new sentence has been added to the shaded box: "After an
24 eviction action is filed, and in order to reinstate the lease, you may be required to pay
25 damages, attorney fees, and court costs." This is misleading for the reasons given
26 above with respect to the five day notice.
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10 Day Notice to Move

The following new sentence has been added to the shaded box: "After an eviction action is filed, and in order to reinstate the lease, you may be required to pay damages, attorney fees, and court costs." This is legally wrong. There is no right to cure or reinstate a tenancy when a second violation during the term of the rental agreement has taken place under ARS §33-1368 (A). This is revealed in the first paragraph of the form that says: "This violation cannot be fixed."

SCOPE OF THESE ADDITIONAL COMMENTS

Treating these additional comments as being in the nature of a true reply brief, these commenting parties have limited their scope to responding to new matters brought out in the ACAJ Reply. Essentially they are limited to what are in effect new rules and forms proposed by the ACAJ.

Although they disagree with many of the points asserted by the ACAJ on such matters as legal authority to impose mandatory form requirements, those issues have been briefed by both sides. No inference should be drawn from the failure of these commenting parties to argue the merits of these issues in this filing.

CONCLUSION

This is a proposed new rule change masquerading as an old one. An examination of what has been done to the forms that are the heart of the Reply shows that they are quite different from what was originally proposed. To let this revised

1 proposal sail through and the new forms to become effective utilizing the procedure
2 that has been elected by the ACAJ effectively denies an opportunity for the public and
3 the rental housing industry to comment and point out errors and areas needing
4 improvement.
5

6 The new proposal should be treated as such and docketed as a new proposed
7 rule change under Supreme Court Rule 28. Supreme Court No. R-16-0040 should be
8 withdrawn or denied.
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10 Allowing new forms to be mandated without a meaningful opportunity for
11 public and industry comment smacks of a back room deal and is certainly inconsistent
12 with the policies set forth in Supreme Court Administrative Order 2014-84, ACJA §
13 1-202 and Supreme Court Rule 28.
14

15 **DATED:** November 14, 2016
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17 **Williams Zinman & Parham, P.C.**
18

19 */s/ Michael A. Parham*
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21 By: Michael A. Parham
22 Melissa A. Parham
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24 A copy of this motion has been e-mailed
25 this 14th day of November 2016 to:

26 Hon. Lawrence Winthrop
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